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No. 83 - 1970

IN THE
Supreme Court of the United States

October Term, 1984

ROY B. HULL, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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25PP

SUPPLEMENTAL

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Petitioner, pro se, respectfully requests the enclosed supplemental brief be added in support of his foregoing petition for a Writ of Certiorari. A proper case background had been previously overlooked. Also an opinion from another case which directly conflicts with petitioners right to justice. This decision now offered was not previously sited in foregoing motions to the United States Court of Appeals for the Fourth Circuit.

-STATEMENT OF FACTS-

Background preparation of case:

On September 30, 1982, an Indictment was filed in the Clerk's Office of the United States District Court for the Northern District of West Virginia at Elkins by the United States Attorney's Office for said Northern District charging Roy B. Hull, Jr., Sergeant and Chief of Security at the Air National Guard Base, Martinsburg, West Virginia (hereinafter referred to as the ANG Base), with two (2) counts of firearms violations. Count I of the Indictment charged Sgt. Hull with making a Palmetto Armory .223 caliber machinegun without an application, and Count II charged him with possessing a Colt AR-15 lower receiver which had been modified to a machinegun receiver without having registered it. (ref. pgs 6 & 7 of original petition)

Sgt. Hull was arraigned on October 12, 1982, at which time he entered a not guilty

plea and a personal recognizance bond was ordered without bond set at \$1,000.00.

The jury trial of this case was held on December 1 and 2, 1982, with the Honorable Robert E. Maxwell, United States District Judge, presiding at Martinsburg, West Virginia. The prosecution's witnesses were Victor Roberts, III, security guard at the ANG Base, James G. Thurston, machinist at the ANG Base, James Robert May, security guard at the ANG Base, Steven J. Pirotte, Special Agent with the BATF, and Robert Barnes, Senior Firearms Enforcement Officer Firearms Specialist with BATF. Colonel Joseph T. Crane, retired Detachment and Base Commander of the ANG Base, Colonel Gaines M. Timberlake, retired Chief of Support Services and Combat Support Squadron Commander of the ANG Base, and Sgt Hull testified for the defense.

At the conclusion of the trial, the jury returned a verdict of guilty to both

Count I and Count II. Judge Maxwell then ordered a presentence investigation. Subsequently, Sgt Hull filed a Motion for Judgment of Acquittal or in the Alternative New Trial to which prosecution responded.

A hearing was held on March 1, 1983, at which time Judge Maxwell denied Sgt. Hull's Motion. However, Judge Maxwell, in a very strongly worded attack on the U.S. Attorney's prosecution of this particular case, severely criticized the U.S. Attorney for lack of prosecutorial discretion and failure to carry out the intent of Congress in prosecuting a very close and perhaps technical violation under a very broadly written and loosely connected statute. Saying it seemed something was amiss in this matter, Judge Maxwell then imposed judgment that Sgt. Hull not be imprisoned, not be placed on probation, but fined the sum total of \$100.00 and costs. Judge Maxwell further invited and encouraged Sgt.

Hull to appeal this case to the United States Court of Appeals for the Fourth Circuit to obtain some solid law in applying the statute in a question to circumstances such as this.

Sgt. Hull appealed from the United States District Court's Judgment and Probation/Commitment Order denying his Motion for Judgment of Acquittal or in the Alternative New Trial and adjudging him guilty as charged and convicted, to the United States Court of Appeals for the Fourth Circuit.

On October 24, 1983, Sgt. Hull's appeal was affirmed in favor of the lower Court, stating "Under this interpretation, Hull's challenges to the sufficiency of the evidence against him must fail. He clearly possessed unregistered machine gun parts. We have considered the remaining assignments of error and found them to be without merit." Decided before Judges

MURNAGHAN and ERVIN, and Senior Circuit Judge BUTZNER.

On March 5, 1984, Sgt. Hull's second appeal was also affirmed in favor of the lower Court, stating, "Hull's Petition for Rehearing is thus denied.

A Motion for 30-day Extension for Petition, Writ of Certiorari, filed on May 3, 1984.

Order, granting extension No. A-893, on May 4, 1984, by Chief Justice.

Filing Writ of Certiorari, June 3, 1984, that Solicitor General waived reply.

Filing Supplemental in Support of Writ of Certiorari, August 31, 1984, with service statement for the three (3) copies to Solicitor General, dated August 31, 1984.

[Note: Statement of the Case was overlooked in *pro se's* original petition.]

-REASONS FOR GRANTING THE WRIT-

Additional discovery of exculpatory evidence (Brady rule):

Withholding evidence of a deal or agreement, between government's witness Victor Roberts, III, and the Assistant United States Attorney (Mr. Thomas O. Mucklow).

On October 21, 1982, Senior Defense Counsel (Mr. Clarence E. Martin, Jr.), requested disclosure of evidence in the prescribed format of documents, copies of evidence, tests, etc., in government's files against petitioner. A select few were released eighteen (18) hours prior to trial, but NOT among these was one conflicting statement given by, nor disclosure of an IMMUNITY BARGAIN, both involving government's witness Victor Roberts, III.

During petitioners appeal efforts that Assistant United States Attorney (Mr. Thomas O. Mucklow) did so reply in

his response dated January 9, 1984, to the U.S. Court of Appeals for the Fourth Circuit, referring to Sgt. Hull's remark, he answered in the following manner:

"...(Petition p.3). Appellant had ample opportunity to examine the arrangement between the United States and Mr. Roberts by reviewing the written agreement between the parties, the "Jencks" material, and by a thorough cross-examination of the witness at trial."

During Assistant United States Attorney's (Mr. Thomas O. Mucklow) re-cross-examination at trial he asked the following question of government's witness Victor Roberts, III, and got this answer:

Q Mr. Roberts, did anyone ever promise you that you wouldn't be prosecuted if you can in and testified today?

A No.

Was it a play on words or a attempt to secure key government's only witness to testify against Sgt. Hull? While the weapon was found at Victor Roberts' home and the only link to Sgt. Hull being the owner, was Victor Roberts. Had the prosecution disclosed the written agreement with Roberts, the jury could not have found Sgt. Hull Guilty.

Other government witness, such as the BATF Agents, told only of weapon testing, of said weapon, not to who had ownership. When witnesses Thurston and May were on the stand they were only able to state that a weapon existed, not to ownership. Because a deliberate deception of the court took place it incompatible to Sgt. Hull's rights.

In the February 24, 1972 opinion by Chief Justice BURGER, refering to Giglio v. United States (1972) 405 US 150, 31 L Ed 2d 104, is as follows:

SUMMARY

Pending appeal of a forgery conviction in the United States Court of Appeals for the Second Circuit, defense counsel discovered new evidence that an Assistant United States Attorney, the first to deal with the accused's co-conspirator, promised the co-conspirator that he would not be prosecuted if he testified for the government. The government's case depended almost entirely on the coconspirator's testimony. The District Court, in denying the accused's motion for a new trial, ruled that the promise by the Assistant United States Attorney was unauthorized and that its disclosure to the jury would not have affected its verdict. The Second Circuit affirmed.

On certiorari, the United States Supreme Court reversed the judgment of conviction and remanded the case for a new trial. In an opinion by BURGER, ch. J., expressing the unanimous views of the court, it was held that (1) the Assistant United States Attorney's

promise was attributable to the government; (2) evidence of the agreement or understanding was relevant to the coconspirator's credibility; and (3) the non-disclosure of this evidence affecting the conconspirator's credibility violated due process and justified a new trial, irrespective of the government's good faith or bad faith.

POWELL and REHNQUIST, JJ., did not participate.

Briefs of Counsel, p 839, *infra*.

HEADNOTES

Constitutional Law § 840 — due process — known false evidence

1. Deliberate deception of a court and jurors in a criminal case by the presentation of known false evidence is incompatible with the rudimentary demands of justice.

Constitutional Law § 840 — due process — false evidence

2. A conviction secured by the use of false evidence must fall under the due process clause where the state, although not soliciting the false evidence, allows it to go uncorrected when it appears.

Constitutional Law § 840 — material evidence — suppression

3. Under the due process clause, the prosecution's suppression of material evidence justifies a new trial irrespective of the prosecution's good faith or bad faith.

Constitutional Law § 840 — evidence — nondisclosure

4. When the reliability of a given witness may well be determinative of guilt or innocence, the prosecution's nondisclosure of evidence affecting credibility justifies a new trial, under the due process clause, irrespective of the prosecution's good faith or bad faith.

Constitutional Law § 840 — due process — suppressed evidence

5. The due process clause does not automatically require a new trial whenever the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict; a finding of materiality of the evidence is required.

Constitutional Law § 840 — due process — false evidence

6. Under the due process clause, a new trial is required in a criminal case if false testimony introduced by the state, and allowed to go uncorrected when it appeared, could in any reasonable likelihood have effected the judgment of the jury.

Constitutional Law § 840 — promise of nonprosecution — disclosure

7. In determining whether due process requires a new trial because of an Assistant United States Attorney's promise to a coconspirator that he would not be prosecuted if he testified as a government witness against his coconspirator, and the government's failure to disclose this promise, neither the Assistant United States Attorney's authority nor his failure to inform his

superiors or his associates is controlling; moreover, whether the nondisclosure was a result of negligence or design, it is the prosecutor's responsibility.

United States § 54 — United States Attorneys — powers

8. The United States Attorney's office is an entity and as such it is the government's spokesman; a promise of nonprosecution made to an Assistant United States Attorney must be attributed, for these purposes, to the government.

Witnesses § 95 — evidence — promise to coconspirator

9. Evidence of any understanding or agreement as to a future prosecution of a coconspirator on whose testimony the government's case almost entirely depends is relevant to his credibility, and the jury is entitled to know of it.

Constitutional Law § 840 — due process — promise to coconspirator

10. Due process requires the reversal of a judgment of conviction and a remand for a new trial, where the government failed to disclose its promise to the accused's coconspirator, upon whose testimony the government's case almost entirely depended, that he would not be prosecuted if he testified for the government.

[Reference: 9 Fed Proc, L Ed
§ 22:708 page 321]

Generally; Brady rule

Although the prosecutor has no duty

to provide defense counsel with unlimited discovery of everything known by the prosecutor, under the Brady rule the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

If a defense request for information presents a substantial basis for claiming materiality, the prosecutor must respond either by furnishing the information or by submitting the issue to the trial judge.

§ 22:709. Standard for assessing effect of nondisclosure

The Brady Rule applies in three different situations:

(1) If the undisclosed evidence demonstrates that the prosecution knew, or should have known, of the perjury, a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

(2) If the defense has made a pretrial request for specific evidence, the suppression by the prosecutor of such evidence deprives the accused of due process, if the suppressed evidence might have affected the outcome of the trial.

(3) If only a general request for Brady material has been made, or no request has been made at all, the prosecutor's suppression of plainly exculpatory evidence warrants a new trial if the omission results in a denial of the accused's right

to a fair trial by removing a reasonable doubt which would otherwise exist, but if it merely might have affected the outcome of the trial. The accused need not demonstrate, however, that the newly discovered suppressed evidence would have resulted in an acquittal.

Evidence not disclosed by the prosecution is not sufficient to raise a reasonable doubt

- if the evidence not disclosed is in fact inculpatory.
- if the evidence not disclosed is inconclusive.
- if the evidence supporting the conviction is overwhelming.

§ 22:710. Necessity of defense request

Exculpatory evidence may be obviously of such substantial value to the defense that elementary fairness will require that it be disclosed even without the defense making a specific request. Indeed, for purposes of an accused's right to a fair trial under the Due Process Clause of the Fifth Amendment, a prosecutor has a constitutional duty to volunteer exculpatory matter to the defense, although a prosecutor does not violate the duty unless his omission is of sufficient significance to result in denial of the defendant's right to a fair trial. If the government has any doubt about the discoverability of evidence not requested it should submit the material to the court for in camera review.

A defense request serves to flag the importance of the evidence to a defense and thus imposes on the prosecutor a

duty to make a careful check of the files. It is within the court's discretion to deny a dragnet motion for the production of all the evidence favorable to the accused. A request is specific enough if, for example, it asks for all promises made to a witness and all actions undertaken on that witness' behalf or at that witness' request, and it need not identify certain documents by date or by addressee.

Although the defense cannot be expected to specify in advance exculpatory evidence that is unknown to the defense, the prosecution faces a similar dilemma in that without a preview of proposed defense it may be uncertain which material from its files is exculpatory.

§ 22:711. Omission by prosecutor;
duty to seek exculpatory evidence

The duty of the prosecutor to volunteer exculpatory matter to the defense is not measured by the moral culpability or willfulness of the prosecutor; the error resulting from nondisclosure of evidence is due to the character of the evidence, not the character of the prosecutor. Nonetheless, it has been held that dismissal of the indictment is the only remedy available when the government deliberately and in bad faith destroys exculpatory evidence. On the other hand, the prosecutor's negligent failure to disclose exculpatory evidence requires reversal only if there was a significant chance that the added evidence could have induced reasonable doubt in the minds of enough jurors to avoid conviction. A prosecutor may be excused if he did not

know of certain evidence, unless he should have known about the evidence.

The prosecutor is not obliged to conduct an investigation to discover information which it does not possess in order to provide the defense with exculpatory evidence. But the prosecutor is obliged to send out requests to other government agencies involved in the prosecution for exculpatory evidence in their files of which the prosecutory is not yet aware.

§ 22:712. Effect of defense negligence

The prosecution's failure to disclose exculpatory evidence is not excused by the contention that diligent defense counsel might have discovered the information on his own with sufficient research. But if defense counsel has learned the information before trial, and negligently fails to follow up on cross-examination or the presentation of its case, the prosecution's failure to make an official disclosure of the evidence does not violate the Brady Rule.

§ 22:717. Other items

Federal criminal convictions have been overturned due to the prosecution's failure to disclose to the defense—

- physical evidence.

- immunity bargains with government witness, although it need not be disclosed until prior to such witness' testimony.

- prior criminal records of government witnesses.

—other evidence bearing on the credibility of government witnesses.

—pretrial statements of government witness, before the disclosure allowed by the Jencks Act, if required as a matter of due process to permit the accused to prepare an effective defense.

—pretrial statements and the names and addresses of witnesses whom the government does not intend to call, although the prosecution is under no duty to search for witness favorable to the defense.

—pretrial statements and criminal records of coconspirators and codefendants.

[Reference: Opinion issued by Justice DOUGLAS in the Brady v. Maryland (1963) 373 US 83, 10 L Ed 2d 215]

"In an opinion by DOUGLAS, J., expressing the view of six members of the Court, it was held that (1) the prosecution's suppression of the accomplice's confession violated the due process clause of the Fourteenth Amendment, but (2) neither that clause nor the equal protection clause of that amendment was violated by restricting the new trial to the question of punishment."

-CONCLUSION-

Regardless of the lack of intent to lie on the part of the witness, various courts have attempted to set forth general guidelines as to when the prosecutor must seek to "correct" his witness' testimony. [Reference Brady rule] This Assistant U.S. Attorney has displayed bad faith, in the failure to "correct" key government witness' Victor Roberts', III testimony. As outlined petitioner now has the right to a New Trial.

As pointed out by the Trial Judge, "a very loosely and broadly worded statute, there is a violation. So the Court has no alternative when the facts have been submitted to a jury, as they were, and the findings were as they were, but to uphold that verdict and judgment of the jury."

Petitioner knew all along that governments' witness, Victor Roberts, was backed into a corner, and trying the only way left open to him, to not be placed in prison for

ten (10) years, was to lie. When the offer of a little leniency came along, that guy would have mislead anyone. By saying Sgt. Hull did it, he removed blame from himself. Is it any wonder he said what he did? Had he told the truth, the jury would have found Sgt. Hull, NOT GUILTY, but Roberts would have been brought to trial later for that very crime which he was trying so very hard to avoid.

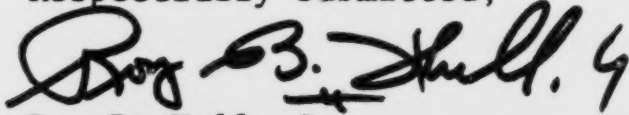
The prosecution crossed a lot of guide lines to cause that guilty verdict to be delivered, to Sgt. Hull. It almost seemed as his very job depended on winning.

Well Victor Roberts, III can not be held totally responsible, when he is kept in fear and guided by an Assistant U.S. Attorney, that is trained to know better.

With the facts presented herein, who could not in good faith, say the jury if told these important facts, about the key witness, would gave another verdict?

DATED: August 31, 1984

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy B. Hull, Jr.", with a stylized flourish at the end.

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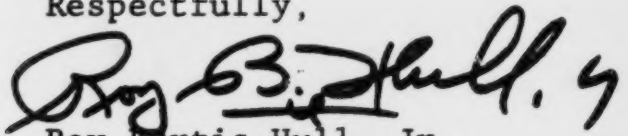
Petitioner, Pro Se

PRO SE OATH

I, Roy Burtis Hull, Jr., SSAN NO:
223-60-5901, do solemnly swear (or affirm)
that as a Petitioner of this Court, I will
conduct myself uprightly and according to
law, and that I will support the Constitu-
tion of the United States of America

Dated: August 31, 1984.

Respectfully,

A handwritten signature in black ink, appearing to read "Roy B. Hull, Jr.", with a stylized flourish at the end.
Roy Burtis Hull, Jr.